

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

<b>FUSION ELITE ALL STARS, et al.,</b>  Plaintiffs,  v.  <b>VARSITY BRANDS, LLC, et al.,</b>  Defendants.	Case No. 2:20-cv-02600-SHL-tmp  <b>JURY TRIAL DEMANDED</b>
<b>JONES, et al.,</b>  Plaintiffs,  v.  <b>BAIN CAPITAL PRIVATE EQUITY, et al.,</b>  Defendants.	Case No. 2:20-cv-02892-SHL-tmp  <b>JURY TRIAL DEMANDED</b>

**PLAINTIFFS' JOINT MOTION REQUESTING EXPEDITED HEARING ON  
APPEAL OF ORDER GRANTING IN PART AND DENYING IN PART MOTION TO  
QUASH OR MODIFY SUBPOENA DIRECTED TO MARLENE COTA AND FOR  
PROTECTIVE ORDER (ECF No. 198)**

Pursuant to Tennessee Western District L.R. 7.2(d), Plaintiffs respectfully request an expedited hearing regarding Defendants' Appeal of Order Granting in Part and Denying in Part Motion to Quash or Modify Subpoena Directed to Marlene Cota and for Protective Order. (ECF No. 198.) Plaintiffs request this expedited hearing because the deposition of Marlene Cota is scheduled for next Wednesday, April 6, 2022.

On November 25, 2020, Plaintiffs served Ms. Cota, a former Varsity employee, with a non-party subpoena to produce certain documents in her possession. Ms. Cota was employed by

Varsity from approximately June 2005 to January 2018 and held the title of “VP Corporate Alliances” at the time of her termination. (ECF No. 178 at 3-5.) As detailed in a letter from Ms. Cota’s attorney sent to Defendants, when Ms. Cota was terminated, Varsity ordered her “to return the following day to receive her personal things.” (ECF No. 178-2 at 1.) The next day, two Varsity employees “placed boxes of Ms. Cota’s personal items into her vehicle. Ms. Cota did not know specifically what the boxes provided by Varsity contained, and she did not examine their contents.” (*Id.*)

Varsity does not deny that this transpired, yet Varsity has claimed that Ms. Cota should not have these documents in her possession and, on December 27, 2021, moved for a protective order to preclude her from producing the documents. (ECF No. 178.) Defendants claimed that the material sought by Plaintiffs belonged to Varsity, not Ms. Cota, because confidentiality and employment agreements between Ms. Cota and Varsity granted Varsity an exclusive property interest in these documents that prevents them from being produced. (*Id.* at 3.)

Plaintiffs opposed Defendants’ motion, arguing that Ms. Cota’s documents are indisputably relevant to Plaintiffs’ claims. (ECF No. 180.) Ms. Cota also has specific responsive documents in her possession, including:

- “agreements and other documents describing or referencing Ms. Cota’s employment compensation, and/or the terms and conditions of her employment with Varsity;”
- “correspondence between Ms. Cota and Varsity employees and/or sponsors or other third parties pertaining to sponsorships, competitions, competitors, and other business dealings;”
- “business development documents disseminated by Varsity to its employees and/or third parties including documents related to acquiring sponsorships and commissions for the acquisition of new sponsorships;” and
- “Ms. Cota’s personal notes made during her employment with Varsity, some of which are loose leaf and many of which are contained in volumes of notebooks.”

(*Id.* at 4-5.) Certain public statements made by Ms. Cota further demonstrate her involvement in and knowledge of the events that are central to Plaintiffs’ cases. For instance, in August 2021, Ms. Cota was interviewed by Mary Carillo on HBO’s Real Sports with Bryant Gumbel exposé regarding allegations of sexual abuse in cheerleading. (*Id.* at 2-3.) In that episode, Ms. Cota made various statements related directly to Plaintiffs’ allegations that Varsity (1) uses its control of USASF to increase its market power, (*Fusion Elite*, ECF No. 56 ¶¶197-205; *Jones*, ECF No. 1 ¶¶102-120), and (2) “refused to take action [against sex abuse] because its market share and lack of effective competition allowed it to resist calls for a more rigid, restrictive, and expensive background check system.” (*Fusion Elite*, ECF No. 56 ¶ 241.) Ms. Cota is also heavily quoted in a September 16, 2021 article from Sportico.com regarding the relationship between Varsity, Jeff Webb, Charlesbank, and Bain, all of which are Defendants in the *Jones* action. (ECF No. 180 at 2, 5.) Ms. Cota’s knowledge and the documents in her possession make it clear that she is a highly relevant figure in this litigation.

On January 28, 2022, Chief Magistrate Judge Tu M. Pham denied Defendants’ motion save for the fact that he allowed Defendants to withhold privileged documents (as long as they were logged) (the “Order”). (ECF No. 193.) Chief Magistrate Judge Pham found that the documents in Ms. Cota’s possession “appear to be relevant to [P]laintiff[s]’ claims that Varsity ‘monopolized the All-Star Cheer and All-Star Apparel Markets’ and engaged in anticompetitive practices that were instituted around the availability of corporate sponsorships.” (*Id.* at 9.) He also found that Ms. Cota “may have documents relevant to [P]laintiffs’ claims that Varsity excluded ‘potential competitors[.]’ access to the showrooms at [its] market-dominant All Star Competitions.’” (*Id.*) As to Defendants’ argument regarding a confidentiality agreement, Magistrate Judge Pham found that “a confidentiality agreement does not make material

‘protected matter’ for purposes of Rule 45.” (*Id.* at 11.) Accordingly, the Order required Marlene Cota “to provide a complete copy of the documents in question to Varsity within seven days from the date of th[e] order[,]” and further ordered Defendants to, within seven days, “review the documents, produce all non-privileged documents to plaintiffs, and if applicable, produce a privilege log.” (*Id.* at 12-13.)

Ms. Cota timely provided her documents to Varsity on February 4, 2022. Defendants, however, refused to produce Ms. Cota’s non-privileged documents. And, rather than seek a stay of the Order, Defendants unilaterally withheld the documents from Plaintiffs in violation of the Order and instead, on February 11, 2022—the day their production was due—appealed the Order to Your Honor. (ECF No. 198.) The effect of Defendants’ actions is that Defendants have had the advantage of reviewing Ms. Cota’s documents in advance of Ms. Cota’s deposition while Plaintiffs have not.

On February 25, 2022, Plaintiffs filed a Response to the Appeal, arguing that Defendants “fail[ed] to meet the high burden set for appealing a magistrate judge’s ruling” and that the Court should deny the Appeal, “especially where the discovery sought is so highly relevant to Plaintiffs’ claims and where Defendants now unilaterally have the full benefit of the evidence and what it contains.” (ECF No. 202 at 1-2.)

With discovery set to close on April 18, 2022, and Ms. Cota's deposition set for April 6, 2022, Plaintiffs respectfully request that the Court schedule an expedited hearing to allow the parties to articulate their positions on the outstanding issues for the Court's consideration. Plaintiffs need Ms. Cota's documents in order to effectively prepare for and take Ms. Cota's deposition next week.

Dated: March 31, 2022

Respectfully submitted,

By: /s/ Karin E. Garvey

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**CERTIFICATE OF GOOD FAITH**

Consistent with Local Rule 7.2(a)(1)(B), counsel for Plaintiffs have attempted to resolve the issues raised in this Motion in good faith with Defendants. On March 31, 2022, at 7:31 AM EDT, Veronica Bosco, counsel for plaintiffs in the *Fusion Elite* matter, contacted Steven Kaiser, Nicole Berkowitz Riccio, and Brendan Gaffney, and informed them of Plaintiffs intent to file the above-captioned Motion. Counsel for defendants Varsity Brands, LLC, Varsity Spirit, LLC, Varsity Spirit Fashions & Supplies, LLC, Charlesbank Capital Partners, and Bain Capital Private Equity responded that they oppose Plaintiffs' request. Counsel for defendants U.S. All Star Federation and Jeffrey Webb did not respond with objections.

/s/ Karin E. Garvey  
Karin E. Garvey

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of March, 2022, I served a copy of the foregoing Plaintiffs' Responses and Objections to Defendants' First Set of Interrogatories via ECF upon the below Counsel:

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